

No. PD-0284-21

IN THE
COURT OF CRIMINAL APPEALS
OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
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EX PARTE
CEDRIC RICHARDSON

From the Court of Appeals for the Second District
02-19-00478-CR, granting Writ of Habeas Corpus
Cause No. 1503620D, Criminal District Court No. 1, Tarrant County, Texas
Hon. Elizabeth Beach presiding

RESPONDENT'S BRIEF ON THE MERITS

August 17, 2021

Lisa Mullen
Attorney for Respondent
3149 Lackland Road, Suite 104
Fort Worth, Texas 76116
(817) 332-8900 F: 332-8904
Bar Number 03254375
Lisa@MullenLawOffice.com

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STATEMENT OF FACTS

Respondent was acquitted as a party to two shootings of the deceased occurring in a single criminal transaction. There were two injured parties during the transaction: one deceased¹ and one who was shot but survived².

Respondent and the shooter³ agreed to sell a gun to the deceased and complainant.⁴ Respondent was an acquaintance of the surviving complainant.⁵ All four met at a Conoco gas station and during the transaction in complainant's car, the shooter, either in an effort to rob or because he saw a gun in the deceased's lap, shot the deceased through the car seat in his back.⁶ Everyone got out of the car and fled.⁷ The shooter picked up the deceased's gun that he dropped while fleeing.⁸

Respondent and the shooter left in Respondent's car, but returned within seconds and helped load the deceased into complainant's car.⁹ The complainant,

¹ Breon Robinson, hereinafter referenced as the deceased.

² Jkeiston Levi, hereinafter referenced as the complainant.

³ Keondrick Polk, hereinafter referenced as the shooter.

⁴ R. Vol. 6 – 78, 85.

⁵ R. Vol. 6 – 80, 119 – 124, 135, 168 - 169.

⁶ R. Vol. 6 – 133, 146 – 148, 153 – 154, 162, 168 – 173, 180, 193 - 194.

⁷ R. Vol. 6 – 181.

⁸ R. Vol. 6 – 181 – 183, 195.

⁹ R. Vol. 6 – 116, 180 – 186.

not knowing directions, was to follow Respondent and the shooter to the hospital.¹⁰ Within three minutes from leaving the gas station, Respondent, who was driving, slowed his car down and the shooter fired into the complainants' car, shooting the deceased in the head and leg and the complainant in the jaw, neck, arm and finger.¹¹ The deceased received two lethal wounds, the one in his back at the gas station and one in the head as the car was driving to the hospital.¹² The complainant testified Respondent was "just there", did not shoot a gun,¹³ was not "down" for what happened and was surprised by the shooters actions.¹⁴

The state went to trial on the case alleging the deceased complainant and argued Respondent's guilt as a party to both shootings.¹⁵ The jury was charged under the law of parties.¹⁶ The shooter was previously tried and convicted of

¹⁰ R. Vol. 6 – 116, 186.

¹¹ R. Vol. 6 – 107 – 109, 117, 196; r. Vol. 7 – 89 – 90; R. Vol. 12 – st. x 2 (distance map).

¹² R. Vol. 8 – 225 – 227; 224 – 244.

¹³ R. Vol. 6 – 107 – 109, 114 – 116; 173, 177, 195 – 196.

¹⁴ R. Vol. 6 – 177, 179; R. Vol. 5 – 216 – 218.

¹⁵ R. Vol. 6 – 78- 214.

¹⁶ C. Supp. R. – 269 – 275; R. Vol 6 – 72 – 80; Vol. 5 – 23- 32; Vol. 6 – 114 – 116; Vol. 9 – 18 – 23, 53 - 56.

capital murder of the deceased. *See Polk v. State*, No.01-18-00450-CR, WL 1442180 (Tex. App. – [1st Dist.] April, 2019, pet. ref’d) (mem. op., not designated for publication).

The jury acquitted Respondent as an accomplice to three charges: capital murder (murder in the course of robbery), aggravated robbery, and two variations of simple murder (intentionally or knowingly causing death and, with the intent to cause serious bodily injury, doing an act clearly dangerous to human life).¹⁷

The state now seeks to proceed to trial in the instant case alleging aggravated assault- the shooting of the living complainant during the same course of conduct.¹⁸ The Court of Appeals found the state collaterally estopped from re-litigating the aggravated assault because the jury had already determined he was not a party to either shooting. *Ex Parte Richardson*, 2021 WL 1134458 (Tex. App. – Fort Worth March 25, 2021) (mem. op., not designated for publication).

¹⁷ Cause number 1485668D; C. Supp. R. – 271 – 272, 274 – 275.

¹⁸ R. Vol. 11.

SUMMARY OF ARGUMENT

Petitioner Issue Number One:

Whether issue preclusion principles such as collateral estoppel are applicable in determining if a prosecution is barred by double jeopardy.

Response:

This issue was not raised in the petition for review, was not granted for review and should be dismissed.

Petitioner Issue Number Two:

Whether collateral estoppel barred the state from prosecuting a defendant for conduct occurring at a different time and place than the original conduct for which the defendant was acquitted when ongoing or intervening circumstances may have changed his culpable mental state between the originally –prosecuted conduct and the potentially-prosecutable later conduct.

Response:

The state mischaracterizes the facts- there were no intervening circumstances. The state presented and argued guilt based upon the entire criminal episode, especially the second shooting, for which he was acquitted.

The state sought to convict Respondent as a party to two shootings during the same course of conduct. The state introduced evidence of the entire transaction

and argued guilt based upon both shootings.

The deceased received fatal gunshot wounds during both shootings; thus, to acquit, the jury must have found he was not a party to either shooting. The case the state now seeks to prosecute- the shooting of the complainant at the same time the deceased was shot a second time- requires a finding that Respondent was a party to the second shooting. This fact has already been determined. The minimal geographic and temporal gaps between the first and second shooting do not alter the continuous nature of the conduct for which the state sought conviction.

The Court of Appeals correctly held the state is collaterally estopped from re-litigating an issue the jury has already determined- that he not a party to the shootings. *Ex Parte Richardson*, 2021 WL 1134458 (Tex. App. – Fort Worth March 25, 2021) (mem. op., not designated for publication).

ARGUMENT

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Response:

The state mischaracterizes the facts- there were no intervening circumstances. The state presented and argued guilt based upon the entire criminal episode, especially the second shooting, for which he was acquitted.

The two-step inquiry for application of collateral estoppel requires a determination of what facts were necessarily decided by the first jury and whether

the state is attempting to re-litigate those facts.¹⁹ As to step one, the Court of Appeals found the fact necessarily decided was that Respondent was not a party to the second shooting.²⁰

The state prosecuted the case as a single criminal transaction relying on both shootings for conviction.²¹ The shooter shot the deceased at the gas station and then shot him again, along with the complainant, a few minutes later and only a mile away, while leaving the scene. Both wounds were lethal.²² Because the deceased received fatal gunshot wounds during both shootings, the jury, to acquit, must have found that Respondent was not a party to either shooting.²³ Although the state is now trying to re-characterize conduct for which they sought guilt as ‘occurring at a different time and place’, they are being barred from re-prosecuting the exact conduct for which they unsuccessfully sought conviction.²⁴

¹⁹ *United States v. Levy*, 803 F.2d 1390, 1398-99 (1986); *U.S. v. Smith*, 470 F.2d 1299 (5th Cir. 1973); *Green v. Estelle*, 601 F. 2d 877 (5th Cir. 1979).

²⁰ *Ex Parte Richardson*, 2021 WL 1134458 (Tex. App. – Fort Worth March 25, 2021) (mem. op., not designated for publication).

²¹ R. Vol. 9 – 18, 23 – 24, 53 – 56.

²² R. Vol. 6 – 107 – 109, 117, 196; R. Vol. 7 – 89 – 90; R. Vol. 8 – 225 – 227; 224 – 244. R. Vol. 12 – st. x 2 (distance map).

²³ *Ex Parte Richardson*, 2021 WL 1134458 (Tex. App. – Fort Worth March 25, 2021) (mem. op., not designated for publication).

²⁴ *Ashe v. Swenson*, 397 U.S. 436, 444-45, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970); *Ex Parte Richardson*, 2021 WL 1134458 (Tex. App. – Fort Worth March 25, 2021) (mem. op., not designated for publication); *Ex Parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002); *Murphy*

The state relied on the second shooting for conviction

In voir dire, the state emphasized the law of parties and, during trial, introduced extensive evidence of both shootings.²⁵ The state repeatedly argued guilt was proven through aiding in both shootings, and relied upon the second shooting, when Respondent was driving the vehicle as the shots were fired, to prove his guilt as a party.²⁶

In opening statement, the state argued regarding the second shooting,

This became a hunt to take out a living witness, and they almost succeeded. [the other prosecutor] read to you -- and you'll get it again in your Charge -- the law of parties. Okay. The aid in the commission of the offense, the idea that if in an attempt to carry out the conspiracy to commit one, another one is committed, it doesn't matter. You're on the hook for it.²⁷

In closing the state argued,

v. State, 239 S.W.3d 791, 794 (Tex. Crim. App. 2007).

²⁵ R. Vol. 4 – 72 -82; Vol. 5 – 23 – 30, 65 – 70; 85 – 89, 94 (officer testified different scenes all the same episode), 113 – 115, 135 – 153 - 156, 174 – 184, 230 – 250, 266 – 280; R. Vol. 6 – 114 – 214.

²⁶ R. Vol. 5 – 23-30.

²⁷ R. Vol. 5 – 30.

Remember that we always say with parties, with intent, with the elements of the offense, you can always consider the defendant's actions and the parties action, the codefendant's actions before, during and after the offense.

...

Before, during and after. Then we have all the activity that occurs on the way to the second scene....

...

[Respondent] is guilty of capital murder. He is. This was a hunt that started out at Miller at that gas station, and it continued to Childress [second shooting location]. How many more times could [complainant] have been shot? It was by the grace of God, by God that [complainant] wasn't killed.

...

[Respondent] and [shooter], they had all the mal intent they could muster that day, because they weren't going to let just [deceased] be the only dead body. They didn't want a living witness in [complainant] either, and they tried so hard to finish that hunt off.²⁸

In final close, the state continued to argue the entire transaction, and especially the second shooting:

We know that after [complainant] got shot, he went dark and black. He doesn't know who shot him afterwards. He has no idea. The law says that's not part of what we have to show. Because if you're in it and you help, you encourage, you participate, then you're down.

...

... [T]hey were never going to leave anybody to get up on that stand. They act like follow me to the hospital, man. And you hear [complainant], I don't know where the hospital is. I can't believe they just shot him, but I'll follow them. And then you heard him talk about how at times he was following [Respondent] who was driving, and then he slowed down. And then he got

²⁸ R. Vol. 9 – 18, 23 – 24.

shot multiple times, and then he left them. [Respondent] left them there. He's in it.

...

But they weren't done. Because when they get to [second shooting], the concern is, I want to make sure, we can't have any witnesses left, because we're on video, because things have gotten bad.

...

You know now that not only did [complainant] get shot, [deceased] was shot multiple times in that car. There's no gunshots in the defendant's car. Those happened when they got to [second shooting]. Because [Respondent] and [shooter] wanted to make sure that they did not leave any witnesses.

...

[to Respondent] You wanted to make sure that you didn't leave any witnesses. You wanted to make sure that you took another son off this earth. He was in from the beginning. He is dangerous. He was in from whatever happened after he set that robbery up.²⁹

The Jury Charge

Respondent was acquitted of aiding the following conduct:

Capital Murder:

Now, if you find from the evidence beyond a reasonable doubt that [Respondent], acting either alone or as a party... did ***intentionally cause the death of [deceased] by shooting [deceased] with a firearm, and the said defendant was in the course of committing or attempting to commit the***

²⁹ R. Vol -9- 53 – 56.

offense of robbery, then you will find the defendant guilty of capital murder.³⁰

Murder:

Now, if you find from the evidence beyond a reasonable doubt that [Respondent], acting either alone or as a party... did then and there ***intentionally or knowingly cause the death of an individual, [deceased], by shooting [deceased] with a deadly weapon, to wit: a firearm***, then you will find the defendant guilty of murder.

Or, if you find from the evidence beyond a reasonable doubt that [Respondent], acting either alone or as a party... did intentionally, ***with intent to cause serious bodily injury to [deceased], commit an act clearly dangerous to human life, namely by shooting [deceased] with a deadly weapon, to wit: a firearm***, and thereby caused the death of [deceased], then you will find the defendant guilty of murder.³¹

Aggravated robbery:

Now, if you find from the evidence beyond a reasonable doubt that [Respondent], acting either alone or as a party... did intentionally or knowingly, ***while in the course of committing theft of property and with intent to obtain or maintain control of said property, cause bodily injury to another, [deceased] by shooting [deceased] with a firearm, or threatened or placed [deceased] in fear of imminent bodily injury or death***, and the defendant used or exhibited a deadly weapon, namely a firearm, then you will find the defendant guilty of aggravated robbery with a deadly weapon.

The jury was instructed as to the following definition:

"In the course of committing theft" means conduct that occurs ***in an attempt to commit, during the commission or in immediate flight after the attempt or commission of the theft***.³²

³⁰ C. Supp. R. – 271 – 272, 274 – 275.

³¹ *Id.*

³² C. Supp. R. – 271.

The Parties Charge

The jury determined Respondent was not a party under the general law of parties and the conspiracy theory:

All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible or by both.

Each party to an offense may be charged with commission of the offense.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids or attempts to aid the other person to commit the offense.

Mere presence alone will not constitute one a party to an offense.

If in the attempt to carry out a conspiracy to commit one felony another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.³³

³³ C. Supp. R. – 271.

The state sought conviction for aiding in the commission of these charges based upon the entire criminal transaction, especially the second shooting. The minimal temporal and geographic separation of a few minutes and less than a mile while leaving the scene- were argued by the state as *probative* of guilt.³⁴ When Respondent was acquitted via general verdicts of all charges, the fact necessarily decided was that he was not a party to any of the conduct and was merely present at both shootings.

The court of appeals correctly prohibited the state from re-litigating a determined fact: Respondent was not a party to the second shooting where complainant was shot

The State seeks to prosecute Respondent as a party to the aggravated assault of the complainant occurring when the shooter shot the complainant and the deceased on the drive to the hospital. Both were shot at the same time. The deceased was lethally wounded at both shootings. Although there were two shooting scenes, there was no logistical legal separation.³⁵ The state proffered and argued both shootings as one continuous criminal episode, specifically arguing guilt in the second.³⁶ It is this shooting the state now seeks to re-litigate in the

³⁴ R. Vol -9- 53 – 56.

³⁵ See *Ex Parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex. Crim. App. 2007).

³⁶ R. Vol. 4 – 72 -82; Vol. 5 – 23 – 30, 65 – 70; 85 – 89, 94 (officer testified different scenes all

form of an aggravated assault.

The integrated acts constituting the shooting of both individuals makes it clear that when the jury decided Respondent was not an accomplice in the first trial, it necessarily determined this as to the second.³⁷ The only rationally conceivable issue in dispute was settled - he was merely present and not an accomplice to either shooting. The present aggravated assault charge alleges this same shooting: that Respondent intentionally or knowingly caused bodily injury to the complainant by shooting with a firearm.³⁸ Respondent can only be prosecuted as a party to this conduct.³⁹ It has been determined he was not an accomplice to this shooting, prohibiting re-litigation of this fact.⁴⁰

the same episode), 113 – 115, 135 – 153 - 156, 174 – 184, 230 – 250, 266 – 280; R. Vol. 6 – 107 – 109, 114 - 214; R. Vol. 7 – 89 – 90; R. Vol. 8 – 225 – 227; 224 – 244; R. Vol. 9 – 18, 23 – 24, 53 – 56; R. Vol. 12 – st. x 2 (distance map).

³⁷ *Ashe v. Swenson*, 397 U.S. 436, 444-45, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970); *Ex Parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex. Crim. App. 2007).

³⁸ C Supp. R. – 8.

³⁹ Respondent was “just there”, did not shoot a gun, was not “down” for the conduct and was surprised by the shooters actions. R. Vol. 6 – 107 – 109, 114 – 116; 173, 177, 195 – 196.

⁴⁰ C. Supp. R. – 271 – 272, 274 – 275; *Ashe v. Swenson*, 397 U.S. 436, 444-45, 90 S. Ct. 1189, 25 L.Ed.2d 469 (1970); *Ex Parte Watkins*, 73 S.W.3d 264 (Tex. Crim. App. 2002); *Murphy v. State*, 239 S.W.3d 791, 794 (Tex. Crim. App. 2007).

CONCLUSION AND PRAYER

For all the foregoing reasons, respondent prays this Honorable Court dismiss the appeal as improvidently granted or affirm the opinion of the court of appeals.

Respectfully submitted,

Lisa Mullen

/s/ Lisa Mullen

ATTORNEY FOR APPELLANT

3149 Lackland Road, Suite 104

Fort Worth, Texas 76116

(817) 332-8900

FAX: 332-8904

Bar Number 03254375

Lisa@MullenLawOffice.com

CERTIFICATE OF SERVICE

I, Lisa Mullen, do hereby certify that a true and correct copy of the foregoing Appellant's brief was e-mailed on August 17th, 2021, to the interested parties listed below:

Tarrant County District Attorney's Office- Appellate Division
Mr. Steve Conder, Bar No. 04656510, Appellate counsel- State
Ms. Ashlea Deener, Bar No. 24068338, trial counsel- State
401 West Belknap
Fort Worth, Texas 76196-0201

Ms. Terri Moore, Bar No. 14377780
300 Burnett Street, Suite 160
Fort Worth, Texas 76102
Mr. Steve Gebhardt, Bar no. 24050649
500 Main Street, Suite 640
Fort Worth, Texas 76102
Trial counsel- Respondent

Mr. Cedric Richardson, Respondent
2721 Finley
Fort Worth, Texas 76111

Honorable Stacey M. Soule- SBOT No. 24031632
State Prosecuting Attorney P.O. Box 13046401
Austin, Texas 78711

Honorable Elizabeth Beach, Presiding Judge, Criminal District Court Number One
401 W. Belknap Street
Fort Worth, Texas 76196

CERTIFICATE OF COMPLIANCE

I, Lisa Mullen, pursuant to Rule 9.4 of the Texas Rules of Appellate Procedure, do hereby certify the word count of the applicable portions of this brief is 3,086 words and within the word count required.

Lisa Mullen

/s/ Lisa Mullen

ATTORNEY FOR APPELLANT

3149 Lackland Road, Ste. 102

Fort Worth, Texas 76116

(817) 332-8900

FAX: (817) 332-8904

Bar Number 03254375

Email: Lisa@Mullenlawoffice.com

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Lisa Mullen
Bar No. 03254375
Lisa@mullenlawoffice.com
Envelope ID: 56382502
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Associated Case Party: CEDRIC RICHARDSON

Name	BarNumber	Email	TimestampSubmitted	Status
Lisa Mullen	3254375	Lisa@mullenlawoffice.com	8/17/2021 1:34:58 PM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Stacey M. Soule		Stacey.Soule@SPA.texas.gov	8/17/2021 1:34:58 PM	SENT
POST CONVICTION TARRANT COUNTY DISTRICT ATTORNEY		COAappellatealerts@tarrantcountytx.gov	8/17/2021 1:34:58 PM	SENT
Ashley DEENER		ADEERNER@TARRANTCOUNTYTX.GOV	8/17/2021 1:34:58 PM	SENT
Terri Moore		moore@terrimoorelaw.com	8/17/2021 1:34:58 PM	SENT
Steve Gebhardt		steve@tgetlaw.com	8/17/2021 1:34:58 PM	SENT
Elizabeth Beach		EHBeach@tarrantcounty.com	8/17/2021 1:34:58 PM	SENT